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No. 87-425

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SAMUEL M. LONGIOTTI and BETTY C. LONGIOTTI,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR PETITIONERS

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ARGUMENT

Respondent contends that Petitioners' claim for mitigation was properly rejected by the Fourth Circuit because the year of the determination and the year for which mitigation is sought are one and the same—1972 (Res. Br. 4). This contention is erroneous and misleading for two reasons:

1. Petitioners originally carried forward $670,108 of the 1973 NOL to 1976 and $238,912 of the 1973 NOL to 1978 (Pet. App. 26a). When the 1972 Tax Court case was settled these carryforwards became erroneous because NOLs are required under Section 172 of the Internal Revenue Code to be carried back and utilized to the extent

allowable and only the unused portion may be carried forward. Because Petitioners' 1972 taxable income was increased by the Tax Court settlement, no portion of the 1973 NOL was available for carryforward to 1976 or 1978. Petitioners' former counsel sought from the Internal Revenue Service an acknowledgment of this fact—an acknowledgment that the 1976 and 1978 deductions were *erroneous* and should properly be allowed in 1972—which acknowledgment would have served as a "determination" under Section 1313(a)(4) of the Internal Revenue Code. *See* Stipulations ¶ 17, Fourth Circuit Joint Appendix at 24. Only because of the Government's refusal to acknowledge officially the erroneous treatment in a form that would serve as a "determination" is the Government able to fabricate its contention that mitigation is not appropriate because "the year of the determination and the year of the proposed correction (under the mitigation statute) were the same—1972."

2. Respondent makes no effort to rebut Petitioners' observation that they can achieve a literal determination of a double disallowance of a deduction by (a) claiming the NOL deductions in a currently open year, 1984 for example, (b) having the deductions denied, (c) suing for a refund, losing and thus creating the literal determination, and (d) suing for a refund on the basis of mitigation (*See* Pet. Br. 10). In such a case, it is irrefutable that there would be a disallowance of a deduction "which should have been allowed to, but was not allowed to, the taxpayer for *another taxable year*." 26 U.S.C. § 1312(4) (emphasis added). The fact that the disallowance of the 1984 deductions would not be based upon the fact that they should have been taken in 1972 would not defeat Petitioners' entitlement to mitigation *unless* the Seventh Circuit's holding in *Olin-Mathieson Chemical Corp. v. United States*, 265 F.2d 293 (7th Cir. 1959), is wrong.

Only by refusing to acknowledge that (1) Petitioners' carryovers of the 1973 NOL to 1976 and 1978 were erro-

neous, or (2) that Petitioners can achieve a literal determination by claiming the NOL in a currently open year, can the Government support its denial of Petitioners' mitigation relief with its "no other year" theory. This "head-in-the-sand" insistence on a literal "determination" when it is patently obvious that a determination can be had is in direct conflict with *J.B.N. Telephone Company, Inc. v. United States*, 638 F.2d 227 (10th Cir. 1981), and in derogation of the equitable purposes of the mitigation provisions.

Not only has the Government used this intransigence in an effort to keep tax paid by these Petitioners that they did not owe, but the Government has exhibited a clear pattern of attempting to retain similar windfalls in other cases by wearing down taxpayers through an insistence on a literal "determination" in mitigation cases. *See Republic Petroleum Corp. v. United States*, 613 F.2d 518 (5th Cir. 1980) (mitigation relief denied in first action for lack of determination) and *Cocchiara v. United States*, 779 F.2d 1108 (5th Cir. 1986) (same parties, same facts, second suit allowing mitigation). There is no way of knowing how many taxpayers simply give up rather than bring a *second* refund suit. It is time to call a halt to this gamesmanship and resolve the split between the Tenth Circuit's decision in *J.B.N. Telephone Company, Inc. v. United States*, 638 F.2d 227 (10th Cir. 1981), and the Second, Fifth and Fourth Circuits' decisions in *Benenson v. United States*, 385 F.2d 26 (2d Cir. 1976); *Republic Petroleum Corp. v. United States*, 613 F.2d 518 (5th Cir. 1980); and *Longiotti v. United States*, 819 F.2d 65 (4th Cir. 1987).

Respondent acknowledges the split between *J.B.N. Telephone* on one hand, and *Republic Petroleum* and *Benenson* on the other, but contends that "this case presents no occasion to address it" (Res. Br. 7, n.4). This contention is erroneous. In *J.B.N. Telephone*, *Republic* and *Benenson*, as well as in this case, a literal determina-

tion had not yet occurred, but in each case was inevitable. The Tenth Circuit in *J.B.N. Telephone* recognized this and allowed the mitigation claim to be considered. The Fifth Circuit in *Benenson* and Second Circuit in *Republic* refused to consider the mitigation claim for lack of a determination, although a determination was inevitable. In this case, the Fourth Circuit states that it is *assuming* there has been a determination, but holds that this *unidentified* determination is not a disallowance of a deduction for one year, which deduction should have been allowed in *another*. The Fourth Circuit and the Respondent have both ignored that there is, or inevitably will be, a determination that does disallow Petitioners' NOL deductions for one year, which deductions should have been allowed in *another*. Thus, by ignoring this circumstance, the Fourth Circuit necessarily embraced the requirement that before mitigation relief can be granted, there must have been a previous, separate action creating the appropriate and literal determination. This position is directly contrary to *J.B.N. Telephone* and this issue is squarely before the Court in this case.

The conflict can perhaps be most forthrightly addressed by the Court in this case through a summary reversal of the Fourth Circuit with a remand to consider the Petitioners' mitigation claim in the light of the Tenth Circuit's decision in *J.B.N. Telephone*.

Respectfully submitted,

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